

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: ██████████

BOARD DATE: 24 May 2024

DOCKET NUMBER: AR20230010230

APPLICANT REQUESTS: an upgrade of his bad conduct discharge (BCD) and correction of his DD Form 214 (Certificate of Release or Discharge from Active Duty), for the period ending 27 September 1983, to show:

- a change in separation authority from “AR 635-200, Chap 3 Sec IV” to “Secretarial Authority,” or some similar neutral basis for separation
- a change in his narrative reason for separation from “As a result of court-martial, other” to “Secretarial Authority,” or some similar neutral reason for discharge

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:

- Legal Brief (7 pages), Tully Rinckey, PLLC, dated 7 June 2023
- DD Form 149 (Application for Correction of Military Record)
- Power of Attorney (POA), Tully Rinckey, PLLC, dated 27 April 2022
- DD Form 214 (2 copies), for the period ending 27 September 1983
- Self-authored statement, undated
- Three statements of support, dated 18 March 2023 to 28 April 2023

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), Section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.

2. The applicant states, in effect:

He had big dreams when he enlisted and was proud to serve his country. He remembers his time in the Army vividly. A lieutenant ordered him to go to the field while on a physical profile. He requested to speak with a superior officer. However, everyone was in the field. The lieutenant wrote him up for disobeying a lawful order. He tried to plead his case, but no one would listen. On 23 November 1981, he was charged with a variety of offenses. His defense lawyer did not provide him any advice or assistance. Nor did he prepare him for his testimony. He was ordered to confinement in a facility for

hardened criminals and Soldiers with mental illness. He still remembers the amount of Soldiers who passed away there.

b. Since his discharge, he began a career as a carpenter and has worked hard. He is happily married to a wonderful woman. She is a teacher, and he is a union carpenter. He is happy and proud of the many positive relationships in his life.

3. Counsel states, in effect, the applicant was under the authority of a medical profile which did not permit him to conduct field activities. This was the basis for the charges against him and his subsequent separation from service. He had ineffective counsel. Despite this, he was found not guilty on multiple charges. The charges he was guilty of did not rise to the level of a BCD. His punishment is disproportionate, and an injustice based upon his honorable service and honorable life post-discharge.

4. The applicant enlisted in the Regular Army on 2 January 1980 for a 3-year period. Upon completion of initial entry training, he was awarded military occupational specialty 31M (Multichannel Communications Equipment Operator). The highest rank he attained was private/E-2.

5. The applicant was counseled on six occasions between 31 July 1980 and 8 November 1980. Areas of emphasis covered in the counseling include:

- duty performance and responsibilities
- below average duty performance on two occasions
- failure to report for formation on multiple occasions
- failure to be at appointed place of duty

6. The applicant was reported absent without leave (AWOL) on 19 November 1980. He surrendered to his unit on 21 November 1980 and was reported present for duty (PDY) on that same date.

7. The applicant was counseled on the cleaning responsibilities of his living area and for failing to make his bed on 10 December 1980.

8. The applicant accepted nonjudicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ) on 10 December 1980, for disobeying a lawful command from his superior commissioned officer to get ready to go back to the field, on or about 19 November 1980, and for disobeying a lawful order from his superior noncommissioned officer (NCO) to take his protective mask with him, on or about 19 November and 20 November 1980. His punishment consisted of reduction to private/E-1, (suspended) forfeiture of \$100.00 pay, extra duty for 7 days, and a verbal reprimand. The suspension of reduction to private/E-1 was vacated on 17 December 1980 and ordered duly executed.

9. The applicant was counseled on 19 December 1980 for failure to report to formation on two occasions on 15 December 1980.

10. The applicant's immediate commander initiated a Bar to Reenlistment on 27 February 1981. As reasons for the action, the commander stated [the applicant] was pending special court-martial; he was repeatedly tardy and absent from assigned duties; he lacked self-discipline; he was repeatedly caught attempting to shirk duties and left them partially completed; he showed very little dedication to his duties as a Soldier; and he was argumentative and belligerent to his supervisors. The action was approved on 6 April 1981.

11. The applicant accepted nonjudicial punishment under the provisions of Article 15 of the UCMJ on 3 August 1981, for willfully disobeying a lawful order from his superior NCO, on or about 23 July 1981. His punishment consisted of forfeiture of \$83.00 pay and 14 days of restriction.

12. Before a special court-martial on 30 November 1981, at Fort Ord, CA, the applicant pled not guilty to and was found guilty of willfully disobeying a lawful command from and behaving himself with disrespect towards his superior commissioned officer and his superior NCO, on or about 23 September 1981, and for failure to go at the time prescribed to his appointed place of duty, on or about 13 November and 16 November 1981. His sentence included confinement at hard labor for seven months, forfeiture of \$350.00 per month for two months, and a bad conduct discharge. The sentence was approved on 12 March 1982, and the record of trial was forwarded for appellate review.

13. A DA Form 4187 (Personnel Action) shows the applicant completed his period of confinement and was reported PDY on 19 January 1982.

14. The applicant accepted nonjudicial punishment under the provisions of Article 15 of the UCMJ on 8 February 1982, for absencing himself from the company area without authority, on or about 3 February 1982. His punishment consisted of 7 days of extra duty and 7 days restriction.

15. Special Court-Martial Order Number 165, issued by Headquarters, 7th Infantry Division, Fort Ord, CA, dated 27 October 1982, shows the findings of guilty and the sentence, adjudged on 30 November 1981, was affirmed and the remaining portion of his sentence was ordered duly executed.

16. Court-martial charges were preferred against the applicant on 13 December 1982 for violations of the UCMJ. The relevant DD Form 458 (Charge Sheet) and supporting DD Forms 4187 show the applicant was charged with three specifications of being AWOL, on or about 12 April 1982 until on or about 15 April 1982, on or about 16 April 1982 until on or about 26 April 1982, and on or about 4 May 1982. He continued to

remain absent at the time the command initiated the charges. The applicant's service record is void of documentation pertaining to the final disposition of the court-martial charges.

17. The applicant accepted nonjudicial punishment under the provisions of Article 15 of the UCMJ on 22 September 1983, for being AWOL on or about 4 May 1982 until on or about 9 September 1983. His punishment consisted of forfeiture of \$280.00 pay for two months, 10 days of extra duty, and 10 days restriction.

18. The applicant was discharged on 27 September 1983, under the provisions of Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel), Chapter 3, by reason of court-martial – other. His DD Form 214 confirms his BCD, with separation code JJD and RE code RE-3, 3B, 3C, and RE-4. He was credited with 2 years, 2 months, and 3 days of net active service, with lost time from 19 November 1980 to 20 November 1980, 30 November 1981 to 18 January 1982, 12 April 1982 to 25 April 1982, and 4 May 1982 to 8 September 1983. He was authorized the Army Service Ribbon.

19. The applicant provides:

a. A POA, dated 27 April 2022, designating the law firm of Tully Rinckey, PLLC, as his attorneys in all matter relating to his employment by the federal government of the United States of America.

b. In three statements of support, dated 18 March 2023 to 28 April 2023, the applicant's wife, friend, and stepdaughter describe the applicant as a dedicated, hard-working man. He is supportive, caring, and always willing to help others. He is an exceptional father figure and grandfather, who demonstrates morality and integrity.

20. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, USC, Section 1552, the authority under which this Board acts, the ABCMR is not empowered to set aside a conviction. Rather, it is only empowered to change the severity of the sentence imposed in the court-martial process and then only if clemency is determined to be appropriate. Clemency is an act of mercy or instance of leniency to moderate the severity of the punishment imposed.

21. Regulatory guidance provides when an individual is discharged under the provisions of AR 635-200, Chapter 3, the applicable narrative reason is "court-martial - other," with separation code "JJD".

22. The Board should consider the applicant's argument and/or evidence in accordance with the published equity, injustice, or clemency determination guidance.

23. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (AHLTA), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting an upgrade of his 27 September 1983 Bad Conduct discharge. He states:

“His Bad Conduct Discharge is grossly disproportionate when considering his minor role in any misconduct and when balanced with his honorable service and honorable life post-discharge.

A review of his record makes it clear that Mr. [Applicant] had a genuine reason for not allegedly following the orders given to him by his Command. At the time of these offenses, Mr. [Applicant] was suffering from injuries that placed him on a medical profile that was supposed to prevent him from participating in physical activities and any activities in the field.

When he raised this to his Command after they issued an order for him to defy his medical profile, it led to a disagreement that served as the basis for his court-martial. He was found guilty at a special court-martial and harshly sentenced to be confined to hard labor for seven months and a Bad Conduct Discharge.

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. The applicant's DD 214 shows he entered the regular Army on 2 January 1980 and received a bad conduct discharge on 27 September 1983 under the provisions provided in Section IV of chapter 3 of AR 635-200, Personnel Management – Enlisted Personnel (1 October 1982): Dishonorable and Bad Conduct Discharge. His separation code of JJD denotes this separation was the result of court martial.

d. Because of the period of Service under consideration, there are no encounters in AHLTAs or documents in iPERMS.

e. The applicant's contemporaneous medical records show he was treated conservatively for a mild left ankle sprain which he reinjured and was placed in a short leg walking cast, a right ankle sprain, dizziness, and bilateral foot pain. Treatment included oral medications, physical therapy, and temporary physical profiles.

f. A physical profile is a way for providers to communicate to a Soldier's Commander a Soldier's medical condition(s) along with their recommendations for associated limitations. Paragraphs 9-3c(4)(d)(1) and 9-3c(4)(d)(2) of AR40-501, Standards of Medical Fitness (1 December 1983), state it is the Soldier's Commander's decision on how to apply the physical profile:

“(1) Determination of individual assignment or duties to be performed are command/administrative matters. Limitations such as "no field duty," "no oversea duty," "must have separate rations," are not proper medical recommendations.

(2) It is the responsibility of the commander/personnel management officer to determine proper assignment and duty, based upon knowledge of the soldier's profile, assignment limitations, and the duties of his grade and Military Occupational Specialty (MOS).”

g. No post-service medical documentation was submitted with the application and he is not registered with the VA.

h. It is the opinion of the ARBA Medical Advisor that an upgrade of his discharge is not warranted.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records, and published DoD guidance for liberal consideration of discharge upgrade requests.

a. The applicant was convicted by a court-martial that sentenced him to a bad conduct discharge. The applicant's trial by a court-martial was warranted by the gravity of the offenses charged. His conviction and discharge were conducted in accordance with applicable laws and regulations and the discharge appropriately characterizes the misconduct for which he was convicted. He was given a bad conduct discharge pursuant to an approved sentence of a court-martial. The appellate review was completed, and the affirmed sentence was ordered duly executed. All requirements of law and regulation were met with respect to the conduct of the court-martial and the appellate review process, and the rights of the applicant were fully protected. The Board found no error or injustice in the separation processing.

b. The Board considered the medical records, any VA documents provided by the applicant and the review and conclusions of the medical reviewing official. The Board

concurred with the medical official’s finding insufficient medical documentation of any behavioral health condition during military service that would mitigate his misconduct. Also, the applicant provided insufficient evidence of post-service achievements or letters of reference of a persuasive nature in support of a clemency determination. Based on a preponderance of evidence, the Board determined that the character of service the applicant received upon separation was not in error or unjust.

c. The applicant’s narrative reason for separation as based on the fact that he was convicted by a court-martial due to his offenses/violations. Absent his misconduct and/or offenses, there was no reason to arraign, prosecute, and sentence him. The underlying reason for his separation was his conviction by a court-martial. Therefore, based on a preponderance of evidence, the Board determined that the narrative reason for separation the applicant received upon separation was not in error or unjust.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
■	■	■	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. Title 10, USC, Section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.
2. Section 1556 of Title 10, USC, requires the Secretary of the Army to ensure that an applicant seeking corrective action by ARBA be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to ABCMR applicants (and/or their counsel) prior to adjudication.
3. AR 635-5-1 (Separation Program Designator [SPD] Codes) provides the specific authorities (regulatory or directive), narrative reasons for separating Soldiers from active duty, and the corresponding separation codes to be entered on the DD Form 214. It states that SPD Code "JJD" is the appropriate code to assign to Soldiers separated under the provisions of AR 635-200, Chapter 3, with the narrative reason for separation "court-martial – other."
4. AR 635-8 (Separation Processing and Documents), currently in effect, explains separation document preparation necessary for Soldiers upon retirement, discharge, or release from active military service or control of the Army. It states the separation document is a synopsis of the Soldier's most recent period of continuous active duty and provides a brief, clear-cut record of active Army service at the time of release from active duty, retirement, or discharge.
5. AR 635-200 sets forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided that:
 - a. An honorable discharge is a separation with honor and entitles the recipient to benefits provided by law. The honorable characterization is appropriate when the quality of the member's service generally has met the standards of acceptable conduct and performance of duty for Army personnel or is otherwise so meritorious that any other characterization would be clearly inappropriate.
 - b. A general discharge is a separation from the Army under honorable conditions.

When authorized, it is issued to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 3, Section IV provided that a member would be given a BCD pursuant only to an approved sentence of a general court-martial, after completion of appellate review, and after such affirmed sentence has been ordered duly executed.

d. Separations under paragraph 5-3 (Secretarial Plenary Authority) are the prerogative of the Secretary of the Army. This authority is exercised sparingly and seldom delegated. It is used when no other provision of this regulation applies, and early separation is clearly in the best interest of the Army. Separations under this paragraph are effective only if approved in writing by the Secretary of the Army.

6. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, USC, Section 1552, the authority under which this Board acts, the ABCMR is not empowered to set aside a conviction. Rather, it is only empowered to change the severity of the sentence imposed in the court-martial process and then only if clemency is determined to be appropriate. Clemency is an act of mercy or instance of leniency to moderate the severity of the punishment imposed.

7. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards (DRB) and Boards for Correction of Military/Naval Records (BCM/NR) regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the type of court-martial. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to other corrections, including changes in a discharge, which may be warranted based on equity or relief from injustice.

a. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, Boards shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

b. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses

or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

//NOTHING FOLLOWS//